Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-285

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAYMOND K. PEIL,
Petitioner

v.

CHARLES E. SPORCK,
Respondent

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI — DISCOVERY

Seymour Kurland
(Counsel of Record)
Ian A.L. Strogatz
M. Norman Goldberger
Patrick Matusky
WOLF, BLOCK, SCHORR AND
SOLIS-COHEN
12th Floor Packard Building
Philadelphia, Pennsylvania 19102
(215) 977-2000

Counsel for Respondent
CHARLES E. SPORCK

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

BEST AVAILABLE COPY

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where prior to a pre-trial deposition an attorney reviews with his client a group of documents selected and compiled by the attorney from among documents previously produced in discovery, is identification (or production) of the selected group of documents protected from wholesale disclosure in pre-trial discovery under Federal Rule of Evidence 612 as opinion work product?

2. When during the course of pre-trial discovery a party requests, pursuant to Federal Rule of Evidence 612, identification (or production) of all documents reviewed by a witness prior to his deposition, must the requesting party first make a showing that the three requisite conditions of Federal Rule of Evidence 612 have been satisfied?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING WRIT	5
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: Page

Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984) 9

Peil v. National Semiconductor Corp., 105 F.R.D. 463 (E.D.Pa. 1984) 4, 10

Peil v. Sporck, 759 F.2d 312 (3d Cir. 1985).... passim

United States v. Wright, 489 F.2d 1181 (D.C. Cir. 1973) 11

Federal Rules of Civil Procedure
Rule 26(b)(3)..... 3, 4, 6, 8

Federal Rules of Evidence
Rule 612..... passim

Supreme Court Rule
Rule 17.1..... 6

Other Authorities
Advisory Committee Note, Rule 612..... 10

No. 85-285

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAYMOND K. PEIL,

Petitioner

v.

CHARLES E. SPORCK,

Respondent

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI — DISCOVERY

COUNTER-STATEMENT OF THE CASE

The discovery issue before the Court arises in the context of a complex securities fraud class action. The Amended Complaint broadly alleges a conspiracy among defendants National Semiconductor Corporation, its President Charles E. Sporck ("respondent") and its Board Chairman Peter J. Sprague to artificially inflate the value of its common stock by means of various misrepresentations and nondisclosures during the period

July 1, 1976 through March 1, 1977. Only respondent Sporck participated as a party in the proceedings before the Court of Appeals.

During pre-trial discovery, petitioner's counsel served numerous sets of interrogatories and document requests. In response, defendants produced hundreds of thousands of documents for inspection from which petitioner's counsel selected more than 100,000 for copying.

At the very inception of respondent Sporck's deposition and before posing any substantive questions, petitioner's counsel inquired broadly whether in preparation for the deposition Mr. Sporck had had an "occasion to examine any documents" (Mand.Pet. Ex. A, p. 9)[1]. After receiving an affirmative response, petitioner's counsel asked Mr. Sporck to describe "the general nature of the documents that [he] examined", and Mr. Sporck responded that he had "looked at . . . some of the documents that my attorneys showed to me last week relative to the case." (*Id.*)

Petitioner's counsel immediately made an oral request of Mr. Sporck's counsel to produce all documents they had reviewed with Mr. Sporck prior to his deposition. (*Id.* pp. 10-11). Representing that all such documents were among those previously produced in discovery, Mr. Sporck's counsel refused, on opinion work product grounds, to produce or identify the group of documents which they had hand-selected and compiled for their pre-deposition review with Mr. Sporck. (*Id.* pp. 11-13). Petitioner's counsel then reached across the table and served a formal request under F.R.Civ.P. 34 for production of such documents. (Mand.Pet. Ex. A, p. 11; Ex. B).

---

1. Reference to "Mand.Pet." is to the Petition for Writ of Mandamus filed with the Court of Appeals and when followed by a letter refers to an exhibit attached to the Mandamus Petition.

At the same time that respondent's counsel refused at the deposition to turn over wholesale their entire file of selected documents, they were willing to permit petitioner's counsel to examine Mr. Sporck on the subject of particular documents in the context of specific factual questions, a practice then employed by petitioner's counsel throughout the deposition. (*Id.* p. 136, 176, 324.) At no time did petitioner's counsel ever ask, and at no time did Mr. Sporck give testimony regarding, whether each or any of the documents selected by his counsel and reviewed with him prior to his deposition had in fact refreshed his recollection concerning any matter on which he testified, had been relied upon by him for his testimony or had otherwise impacted on or influenced his testimony.

After the deposition, Mr. Sporck filed a formal response to petitioner's F.R.Civ.P. 34 request and objected to producing the requested documents on various bases, including the attorney opinion work product doctrine. (Mand.Pet. Ex. C). Petitioner filed a motion to compel production arguing that the entire file of documents selected by counsel from among documents already produced in discovery for review with Mr. Sporck was properly discoverable as a separate group under Federal Rule of Evidence 612, that any attorney work product protection attaching to that file of selected documents had been waived by the mere fact that Mr. Sporck had reviewed such documents prior to his deposition and finally that all such documents were generally "needed" to conduct an effective cross-examination. (Mand.Pet. Ex. D.)

In opposition to the motion to compel production, Mr. Sporck contended, among other things, that the file of counsel's selected documents constitutes opinion work product under F.R.Civ.P. 26(b)(3) entitled to the highest degree of protection, that the opinion work product protection of F.R.Civ.P. 26(b)(3) has not been superseded or abrogated by F.R.E. 612, that petitioner's

generalized claim of need was an insufficient showing under F.R.Civ.P. 26(b)(3) to justify compelled production of the requested documents and that, in any event, petitioner had made no showing whatsoever that the requisite conditions governing the applicability of F.R.E. 612 had been satisfied. (Mand.Pet. Ex. G.)

Initially, the district court, in its August 22, 1984 bench ruling and order, found that counsel's file of selected documents constituted opinion work product, but nevertheless ordered production reasoning that all work product protection had been "waived" by virtue of Mr. Sporck's review of the documents prior to his deposition. (Mand.Pet. Ex. E; H, pp. 34-38). Upon Mr. Sporck's motion for reconsideration, the district court, by memorandum and order dated October 31, 1984 and reported at 105 F.R.D. 463, reaffirmed its prior production order, this time on a different basis. Holding that counsel's selection of documents, although work product, did not rise to the highest protected level of "core work product," the district court concluded, without record support, that the "interest of justice" requires identification of all documents selected by respondent's counsel and reviewed by Mr. Sporck prior to his deposition. 105 F.R.D. at 466-67.

Mr. Sporck petitioned the Court of Appeals for a writ of mandamus directing the District Court to vacate its August 22, 1984 and October 31, 1984 orders compelling identification (or production) of the requested documents. In its decision, reported at 759 F.2d 312, the Third Circuit first held that the selection and compilation of documents by respondent's counsel from among the hundreds of thousands previously produced in discovery falls within the "highly-protected category of opinion work product," placing upon the district court "an obligation . . . to protect against unjustified disclosure of defense counsel's selection process." *Id.* at 316, 317. The Court of Appeals next examined the issue whether Federal Rule of Evidence 612 removed the opinion work

product protection accorded counsel's selection process and found that F.R.E. 612 "does not apply to the facts of this case." *Id.* at 317. According to the Third Circuit, F.R.E. 612 requires that a party meet three conditions before it may obtain documents reviewed by a witness prior to testifying: 1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice. *Id.* In the Court of Appeals' view, petitioner had failed to establish the first two of these requisite conditions. Ruling that the district court "did not properly condition its application of Rule 612 on a showing that petitioner relied upon the requested documents for his testimony and that those documents impacted on his testimony," the Court of Appeals held that this clear error of law became prejudicial "when it implicated work product of petitioner's counsel." *Id.* at 318. Confident that the trial court would proceed in accordance with its opinion without formal issuance of the requested writ, the Court of Appeals remanded to the district court. *Id.* at 319. Petitioner's request for rehearing and for rehearing en banc by the Court of Appeals was denied by order dated May 21, 1985.

REASONS FOR DENYING WRIT

The Petition for a Writ of Certiorari presents no special and important reason justifying discretionary review and is based upon a mischaracterization of the factual record and of the holding of the Court of Appeals. Documents reviewed by a witness prior to a deposition may not be ordered produced in discovery pursuant to Federal Rule of Evidence 612 without a showing that the conditions of Rule 612 have been satisfied.

The Petition for a Writ of Certiorari filed herein presents no "special and important reason" supporting such discretionary review by this Court. The decision of

the Court of Appeals does not conflict with the decision of another federal court of appeals on the same subject and does not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Supreme Court Rule 17.1.[2]

Petitioner does not challenge the Third Circuit's determination that the selection by respondent's counsel of documents for review by their client from among the many documents already produced in discovery constitutes opinion work product. Instead, discretionary review is here sought on two issues (one factual and the other both factual and legal) raised here by petitioner only in the abstract, for neither can fairly be said to arise from the Third Circuit's narrow holding that the district court here committed clear, prejudicial error of law when it ordered production of documents under F.R.E. 612, over respondent's opinion work product objection, without first and at a minimum requiring petitioner to satisfy the conditions of F.R.E. 612.[3]

First, petitioner asserts there was insufficient "linkage" between the selected documents and the attorney selection process to justify opinion work product protection. According to petitioner's version of the facts of record, it was respondent's counsel who "affirmatively disclosed his role in the selection process", Petition at 18, and absent that disclosure, petitioner's counsel would not even have known that attorney work product was involved. *Id.* at 14, 15, 16, 17, 18, 19. Second, petitioner

2. The Third Circuit is the first federal appellate court to confront the precise issues raised herein concerning the interplay between F.R.Civ.P. 26(b)(3) and F.R.E. 612. 759 F.2d at 315.

3. Because it determined that the conditions of Rule 612 had not been satisfied, the Court of Appeals did not resolve the issue whether, when opinion work product is implicated, the standards of F.R.Civ.P. 26(b)(3) or those of F.R.E. 612 govern discovery requests. 759 F.2d at 318 n. 7. Respondent had argued, among other things, that F.R.Civ.P. 26(b)(3), not F.R.E. 612, determines the discoverability of such work product. (Mand.Pet.).

reads the Third Circuit's opinion as limiting to a witness's own testimony the record which a trial court may ever properly consider in determining whether the conditions of F.R.E. 612 have been satisfied. In petitioner's view, such a limitation would be an unnecessary restriction on the trial court's discretion warranting review by certiorari. Neither ground is correct as a matter of fact on this record, and neither supports granting the requested writ.

In the first place, and contrary to petitioner's repeated assertions, Petition at 14, 15, 16, 17, 18, 19, it was not respondent's counsel who disclosed his role in the document selection process thereby bringing to everyone's attention the opinion work product issue. Rather, as the record makes clear, counsel's role in the selection process was revealed quite innocently by the witness himself. Petitioner's counsel, at the very inception of the deposition and before posing any substantive questions, asked the witness broadly to describe "the general nature of the documents that [he] examined," and Mr. Sporck responded that he had "looked at . . . some of the documents that my attorney showed to me last week relative to the case." (Mand.Pet. Ex. A, p. 9). It was only then that petitioner's counsel requested production of all such documents which respondent had reviewed. (Mand.Pet. Ex. A, p. 10-11).

In any event, whether it is an attorney in making a work product objection or a witness in giving testimony who discloses, in response to a discovery request, that work product is implicated does not alter the work product characteristics of the information or document so requested. Every work product objection to a discovery request necessarily reveals the fact that it is work product which is being requested and which is being withheld for that reason. Yet, in petitioner's view, work product protection should be denied whenever an attorney raises an objection on work product grounds, since absent the objection the requesting party would not even

know that work product is involved. In this case, petitioner's contention that respondent's counsel injected the work product issue into the proceedings is both factually incorrect and legally irrelevant. Review by certiorari is certainly inappropriate on this basis.[4]

Petitioner's second contention is based upon an erroneous reading of the Third Circuit's holding as limiting to a witness's own testimony the record which a trial court may properly consider in determining the applicability of F.R.E. 612. Petition at 19, 20. As even a cursory examination of the decision reveals, the Court of Appeals' narrow ruling, based upon the facts and circumstances of record in this case, is not so restricted.

The Court of Appeals found that F.R.E. 612 requires that a party meet three conditions before it may obtain documents used by a witness prior to testifying: 1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interests of justice. 759 F.2d at 317. The Court of Appeals found that petitioner had failed to establish the first two of these requirements:

> In seeking identification of all documents reviewed by [Mr. Sporck] prior to asking [him] any questions concerning the subject matter of the deposition, [petitioner's] counsel failed to establish either that

4. Petitioner's "linkage" argument also misses the point for the simple reason that a party, such as respondent, is also entitled to work product protection. F.R.Civ.P. 26(b)(3). If Mr. Sporck had himself selected documents for pre-deposition review, the identity of those documents would also be work product discoverable only upon a showing of "substantial need" and "undue hardship". F.R.Civ.P. 26(b)(3). Whether in such circumstances a sufficient F.R.E. 612 showing would mandate application of the F.R.E. 612, rather than F.R.Civ.P. 26(b)(3), standards to a discovery request for all documents selected for review by the witness himself is similar to the question which the Third Circuit found unnecessary to resolve. 759 F.2d at 318 n. 7.

> [Mr. Sporck] relied on any documents in giving his testimony, or that those documents influenced his testimony. Without first eliciting the testimony, there existed no basis for asking [Mr. Sporck] the source of that testimony. We conclude, therefore, that deposing counsel failed to lay a proper foundation under Rule 612 for production of the documents selected by counsel.

759 F.2d at 318.

In the proceedings before the district court, petitioner made no attempt whatsoever to establish satisfaction of the requirements of F.R.E. 612. (Mand.Pet. Ex. D). Indeed, no record at all on this issue was developed or presented by petitioner. At the deposition itself, petitioner's counsel did not even bother to ask the witness whether each, let alone any, of the documents, reviewed by him and collected *en masse* in his counsel's file, had in fact refreshed his recollection or had in fact impacted his testimony on any subject.[5] Instead, after hearing that petitioner had reviewed documents selected and compiled by his counsel from among those already produced in discovery, petitioner's counsel immediately demanded production of all such documents without making any effort whatsoever to lay a foundation under F.R.E. 612. 759 F.2d at 318.

Before the district court, petitioner's original motion to compel argued that all work product protection had been "waived" by Mr. Sporck's review of documents selected for that purpose by his counsel, (Mand.Pet. Ex. D), a theory accepted by the trial court's initial ruling, without any consideration of the requirements of F.R.E. 612. (Mand.Pet. Ex. E, H).[6] On respondent's motion for

5. Having not even asked the question of the witness, petitioner is in no position to quarrel with the Court of Appeals' endorsement of that mode of proof. 759 F.2d at 318.

6. The automatic waiver theory was rejected by the Court of Appeals, 759 F.2d at 317 n. 6, on the basis of its prior ruling in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984).

rehearing, the district court reaffirmed its prior ruling on a different basis, again without finding that the first two requirements of F.R.E. 612 had been met. 105 F.R.D. at 466-67. It would have been unable to find satisfaction of the Rule 612 conditions in any event, since petitioner had placed before it no record whatsoever evidencing either that Mr. Sporck had in fact relied upon any, let alone each, of the documents in giving his testimony or that any, let alone each, of the documents reviewed by him had in fact influenced his testimony.

Whatever discretion a district court may have under the third condition of F.R.E. 612 to order production of reviewed documents shown to have impacted the witness's testimony when "necessary in the interests of justice," that discretion may not be exercised unless and until it is established that the first two conditions of F.R.E. 612 have also been met. Without the required showing that the witness in fact "relied upon the requested documents for his testimony and that those documents impacted on his testimony", 759 F.2d at 318, a blanket request, as here, for all documents simply reviewed by a witness would become precisely the kind of "fishing expedition" which the drafters of F.R.E. 612 specifically intended to avoid:

> The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

F.R.E. 612 Advisory Committee Note.[7]

---

7. Indeed, even when it is found that a particular writing in fact was relied upon by a witness, that it in fact impacted his testimony and that the interests of justice require its production, the Rule also mandates that the trial court excise from the document any portions "not related to the subject matter of the testimony." F.R.E. 612.

The Court of Appeals' endorsement of one mode of satisfying the conditions of F.R.E. 612 cannot fairly be read to exclude, as a matter of law, other methods of proof in other factual circumstances as petitioner contends. In most, if not all, cases, a witness's denial or admission of the F.R.E. 612 conditions will end the Rule 612 inquiry, *see United States v. Wright*, 489 F.2d 1181, 1189 (D.C.Cir. 1973), and in other circumstances a witness's denial of refreshment may not be enough to foreclose a Rule 612 production order if impeached by other evidence of record.[8] Each case must be determined on its own facts. One need not speculate at this point about the full range of factual patterns that may arise in the future under Rule 612. In this instance, petitioner placed before the trial court nothing whatsoever to suggest, let alone establish, fulfillment of the Rule's conditions. He already had in his possession every document which Mr. Sporck had reviewed prior to his deposition. He did not even bother to try the obvious mode of proof, later endorsed by the Court of Appeals, of asking the witness whether any document had refreshed him or impacted his testimony. He made no effort at all to satisfy Rule 612's conditions. In short, the district court ordered wholesale disclosure under F.R.E. 612 — here of attorney opinion work product — without any Rule 612 showing at all. This was clear, prejudicial error of law. There is no reason to grant review by certiorari.

---

8. As is clear from its opinion, rather than limiting the methods for showing satisfaction of the Rule 612 conditions, the Court of Appeals was demonstrating that when the Rule 612 conditions are satisfied by a correct method of foundational support, the work product doctrine would not become implicated. Since the identification of documents would then result "from opposing counsel's own selection of relevant areas of questioning, and from the witness' subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed," "deposing counsel would discover documents through his own wit, and not through the wit of his adversary." 759 F.2d at 318-19.

CONCLUSION

For all of the foregoing reasons it is respectfully requested that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

/s/ Seymour Kurland

Dated:
September 18, 1985

Seymour Kurland
Ian A.L. Strogatz
M. Norman Goldberger
Patrick Matusky
Counsel for Respondent,
Charles E. Sporck

OF COUNSEL:

WOLF, BLOCK, SCHORR
and SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, Pennsylvania 19102
(215) 977-2000